Chong Soo Sin (t/a Syarikat Perniagaan Moden) v Industrial & Commercial Insurance (M) Bhd

HIGH COURT (KUALA LUMPUR) — SUIT NO C 2376 OF 1983
SITI NORMA YAAKOB J
12 MARCH 1991

Agency *— Sub-agent — Position of sub-agent in law — Whether privity of contract exists between principal and sub-agent — Knowledge acquired by sub-agent — Whether attributable to principal*

Evidence *— Expert evidence — Chemist as witness — Chemist registered under Chemists Act 1975 — Skill and experience as chemist — Whether such witness is an expert*

Insurance *— Fire insurance — Waiver — Breach of warranty in policy by plaintiff — Defendant unaware of breach — Whether plaintiff's plea of waiver sustainable*

Insurance *— Fire insurance — Contract of indemnity — Insurable interest — Plaintiff kept goods for sale or return — Title to goods not in plaintiff — Whether plaintiff had insurable interest over goods — Whether goods insured by policy*

Insurance *— Fire insurance — Fraudulent claim alleged — Particulars of fraudulent means and/or devices used by plaintiff — Burden of proof*

The plaintiff had insured his stock-in-trade against the risk of fire with the defendant. A fire occurred during the currency of the insurance policy destroying the plaintiff's entire stock-in-trade, furniture, fixtures and fittings. The defendant has repudiated liability on the grounds that the plaintiff had no insurable interest in about 70% of the stock-in-trade destroyed by the fire, that the plaintiff had breached the conditions and warranties of the insurance policy and that the plaintiff's claim was fraudulent. Amongst other conditions, the policy covers goods held on trust or on commission by the plaintiff. The plaintiff had goods on consignment basis which were destroyed by the fire. The plaintiff produced a letter confirming that the goods were delivered to him on credit basis.

Held, dismissing the claim:

(1) A fire insurance is a contract of indemnity and only those with an insurable interest on the property insured can recover to the extent to which the insurable interest is damaged by fire. The policy covers only damages to goods held on trust or on commission. There was grave doubt as to the origin and authenticity of the letter confirming the change to supply the goods to the plaintiff on credit rather than on consignment terms as originally agreed. As the goods destroyed were on consignment basis, they are not covered by the policy.

(2) As the goods delivered to the plaintiff were for sale or return, they cannot possibly form the property of the plaintiff at the time of the fire and to that end the goods are not covered by the policy.

(3) As warranty 6A which lists goods for which storage is prohibited by the policy has not been specifically and expressly endorsed in the policy, it is not binding to either the plaintiff or the defendant and to that end, the defendant cannot seek its protection.

(4) While an expert must be skilled, he need not be so by special study, he may be so by experience; the fact that he had not acquired his knowledge professionally goes merely to weight and not to admissibility. As the defendant's chemist had been registered under the Chemists Act 1975, he has the necessary skill and experience and to that end he is an expert. As he had the statutory power to issue the certificate and he had discussed the tests with the chemist who actually conducted the tests and he signed it after concurring with the findings, it was admissible as evidence of an expert.

(5) The position of the sub-agent in law is that generally there is no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. Thus knowledge acquired by the agent becomes the knowledge of the principal but knowledge of the sub-agent can never be attributed to the principal. Since the defendant was not aware that the plaintiff had breached warranty 9A by not having a godown licence, the plaintiff's plea of waiver of such a breach does not arise.

(6) The burden of proving fraudulent means and devices is the criminal burden of proof beyond reasonable doubt. Apart from the particulars of fraud, false declaration, fraudulent means or devices pleaded by the defendant, there are other aspects of this case which when weighed in all its totality adds up to the plaintiff's claim being made fraudulently. From the very conduct of the plaintiff and his supplier and coupled with the court's findings of the means and devices embarked upon by the plaintiff to pursue his claim, the court had no doubt that his claim had been made fraudulently under Condition 13 of the policy and he had thereby forfeited his right to claim under the policy.

[**Bahasa Malaysia summary**

Plaintif telah menginsuranskan stok niaga beliau daripada risiko kebakaran dengan defendan. Satu kebakaran telah berlaku semasa polisi insurans itu terpakai yang memusnahkan seluruh stok niaga plaintif, perabot, alat lekapan dan lekatan. Defendan menolak liabiliti atas alasan bahawa plaintif tidak mempunyai kepentingan yang boleh diinsuranskan pada kira-kira 70% stok niaga yang musnah dalam kebakaran itu, bahawa plaintif telah melanggar syarat dan waranti polisi insurans tersebut dan bahawa tuntutan plaintif adalah secara fraud. Di antara syarat yang lain, polisi itu menjamin gantirugi barang-barang yang dipegang dalam amanah atau atas komisyen oleh plaintif. Plaintif mempunyai barang-barang konsaimen yang telah musnah dalam kebakaran itu. Plaintif mengemukakan satu surat mengesahkan bahawa barang-barang tersebut telah diserahkan kepadanya berdasarkan kredit.

Diputuskan, menolak tuntutan itu:

(1) Suatu insurans kebakaran adalah kontrak tanggung-rugi dan hanya mereka yang mempunyai kepentingan yang boleh diinsuranskan atas harta yang telah diinsuranskan boleh mendapat bayaran gantirugi pada setakat mana kepentingan yang boleh diinsuranskan itu dimusnahkan oleh api. Polisi tersebut menjamin hanya kerosakan kepada barang-barang yang dipegang dalam amanah atau atas komisyen. Terdapat keraguan besar mengenai asalusul dan keesahan surat tersebut yang mengesahkan penukaran pembekalan barang-barang itu kepada plaintif atas kredit daripada terma konsaimen seperti yang pada mulanya dipersetujui. Oleh kerana barang-barang yang musnah berdasarkan konsaimen, mereka tidak dijamin oleh polisi itu.

(2) Oleh kerana barang-barang yang diserahkan kepada plaintif adalah untuk dijual atau dikembalikan, mereka tidak mungkin merupakan harta plaintif pada masa kebakaran berlaku dan dari itu barang-barang tersebut tidak dijamin oleh polisi itu.

(3) Oleh kerana waranti 6A yang menyenaraikan barang-barang yang dilarang disimpan oleh polisi itu tidak dengan khususnya dan dengan nyata disahkan dalam polisi itu, ia tidak mengikat plaintif ataupun defendan, dengan itu defendan tidak boleh meminta perlindungannya.

(4) Walaupun seseorang pakar haruslah berkemahiran, beliau tidak semestinya menjadi begitu secara pelajaran khas, beliau boleh menjadi begitu secara pengalaman; dan fakta bahawa beliau tidak memperolehi pengetahuannya secara professional menyentuh hanya pengaruhnya dan bukan kebolehterimaannya. Oleh kerana ahli kimia defendan telah didaftarkan di bawah Akta Ahli Kimia 1975 beliau mempunyai kemahiran dan pengalaman yang diperlukan dan pada setakat itu beliau adalah seorang pakar. Kerana beliau mempunyai kuasa statutori untuk mengeluarkan sijil itu dan beliau telah membincangkan ujian itu dengan ahli kimia yang sebenarnya telah menjalankan ujian tersebut dan beliau telah menandatangani sijil itu setelah bersetuju dengan kesimpulan yang didapati ia boleh diterima sebagai keterangan seorang pakar.

(5) Kedudukan seseorang ejen kepada si ejen ('ejen kedua') dari segi undang-undang adalah biasanya tidak ada priviti kontrak antara prinsipal dan ejen kedua; ejen kedua itu bertanggungjawab hanya kepada majikannya, iaitu si ejen. Demikian pengetahuan yang diperolehi oleh si ejen menjadi pengetahuan prinsipal tetapi pengetahuan ejen kedua tidak boleh langsung dianggap sebagai pengetahuan prinsipal. Oleh kerana defendan tidak sedar yang plaintif telah melanggar waranti 9A sebab tidak mempunyai lesen gudang, pli penepian plaintif akan perlanggaran tersebut tidak timbul.

(6) Beban membukti cara fraud dan tipudaya adalah beban jenayah iaitu bukti melebihi keraguan munasabah. Selain daripada butir-butir fraud, deklarasi palsu, cara fraud atau tipudaya yang dihujahkan oleh defendan, ada lain aspek kes ini yang apabila ditimbangkan

dalam keseluruhannya menunjukkan bahawa tuntutan plaintif dibuat secara fraud. Daripada kelakuan plaintif dan pembekalnya bersamaan dengan pendapat mahkamah tentang cara dan tipudaya yang dilakukan oleh plaintif untuk menuntut tuntutannya, mahkamah tidak mempunyai keraguan yang tuntutannya telah dibuat secara fraud di bawah Syarat 13 polisi itu dan dia telah oleh kerana itu kehilangan haknya untuk menuntut di bawah polisi itu.]

[*Editorial Note*: The plaintiff has appealed to the Supreme Court vide Civil Appeal No 03-37-91.]

Cases referred to

1 *The North British and Mercantile Insurance Co v Moffatt & Anor* (1871) 7 CR 25 (folld)
2 *PP v Muhamed bin Sulaiman* [1982] 2 MLJ 320 (folld)

Manjit Singh and S Dass (Abdul Rahman Saad & Associates) for the plaintiff.

SK Sivam (PG Lim & Co) for the defendant.

Cur Adv Vult

Siti Norma Yaakob J: As the sole proprietor of Syarikat Perniagaan Moden, the plaintiff was the dealer of motor accessories, air fresheners, toys and textile materials at the relevant time when this cause of action arose. He had stored all his stock-in-trade at his godown situated at 69 Jalan Satu, Taman Bukit Anggerik, off Jalan Cheras, Kuala Lumpur and to guard them against the risk of fire, had insured them together with the furniture, fixtures and fittings of the godown with the defendant.

The policy of insurance dated 11 October 1982 that was issued by the defendant, D27, covers the period from 1 October 1982 to 1 October 1983, and it was during the currency of this policy on 8 January 1983, that a fire broke out at the plaintiff's godown which completely destroyed his entire stock-in-trade, furniture, fixtures and fittings and for such losses he now claims the sum of $1,006,497.

The defendant has repudiated liability all along and has pleaded the following specific defences:

(1) The plaintiff had no insurable interest in about 70% of the stock-in-trade destroyed by the fire and these refer to the super tyre ambulancers, P1.
(2) The plaintiff had breached Condition 7(a) of D27.
(3) The plaintiff had breached Warranties 6A, 6C and 9(A) of D27.
(4) The plaintiff's claim is fraudulently made under Condition 13 of D27.

PW2, the plaintiff's eldest brother, managed Syarikat Perniagaan Moden solely and by virtue of his past associations with a company called Banfoong Sydney (JM) Sdn Bhd ('Banfoong'), where he worked for three years. Prior to joining the plaintiff, PW2 managed to secure the appointment of the

plaintiff as the sole distributor of Banfoong's products, namely, super tyre ambulancers like P1, car fresheners like P2, and air presses like P3. Apart from Banfoong, the plaintiff had two other local suppliers, Bentall Sdn Bhd who supplied toys and tissue covers and Toyong Jaya Trading Sdn Bhd who supplied T-shirts.

Under Condition 2 of the sole distributorship agreement dated 15 September 1982, AB22, all of Banfoong's products were to be delivered to the plaintiff on a three-month credit basis except for P1, which would be on consignment basis. By this arrangement, PW2 explained that Banfoong supplied P1 with instructions to sell or return, ie if the plaintiff sells some of P1, he will keep part of the unsold ones as commission and return the remainder to Banfoong. If he cannot sell P1 altogether, he will have to return all the unsold super tyre ambulancers to Banfoong.

At the outbreak of the fire, the plaintiff had $1,004,399.50 worth of goods supplied by Banfoong, the plaintiff's chief supplier. This is evidenced by exhs AD1–4. More than half of such goods were super tyre ambulancers like P1, as evidenced by AD1 where Banfoong had invoiced the plaintiff the sum of $513,599.50 for the supply of 36,751 cans of P1. It is these very goods destroyed by the fire which the defendant now maintains are not covered by D27 as the policy assumes legal responsibility for only damages to goods held on trust or on commission. Being consigned goods, the defendant further contends that P1 belongs to Banfoong and it was Banfoong's responsibility and not the plaintiff's to arrange its own insurance to cover its property.

To rebut this contention, the plaintiff relies on AD6, a letter dated 27 September 1982 written by Banfoong, wherein it agreed to vary Condition 2 of AB22 by extending credit facility to P1 as well, and stretching the maximum period of such facility for all goods supplied, including P1, to five months.

A fire insurance is a contract of indemnity and only those with an insurable interest on the property insured can recover to the extent to which the insurable interest is damaged by the fire.

Under AB22, it is very clear that the plaintiff was keeping P1 for sale at the time of the fire, and under such circumstances as the title to such goods had not passed to the plaintiff, I consider that the plaintiff had no insurable interest over the goods and they cannot therefore form part of the property insured by D27.

But what of AD6, Banfoong's letter confirming its change of mind to supply P1 on credit rather than on consignment terms as originally agreed two weeks earlier in AB22? AD6 is dated 27 September 1982 but its presence was not disclosed firstly to Messrs Graham Miller & Co ('Graham Miller'), the defendant's adjusters who did a thorough physical inspection of the premises three days after the fire and came out with their report, D18. Neither was AD6 mentioned in the plaintiff's statutory declaration, AD8 dated 19 January 1983 that was prepared by Graham Miller. It only surfaced three weeks later through a letter AD14 dated 9 February 1983 written by Banfoong's solicitors after Graham Miller had made searching enquiries to Banfoong, by letters and meetings, as to whether it had insured P1. In the course of such correspondence and meetings between the period

19 January 1983 to 9 February 1983, neither the plaintiff nor Banfoong produced AD6 nor made any reference to it when what was sought by Graham Miller was the very existence of AD6 itself which on the face of it had been executed on 27 September 1982. The fact that it only surfaced on 9 September 1983 bears grave doubt as to its origin and authenticity for in all probability and to borrow Mr Sivam's suggestion, it was backdated to bolster the plaintiff's claim. This probability is made all the more certain by the fact that Graham Miller discovered a credit note issued by Banfoong three days before the fire on 5 January 1983, to the plaintiff in respect of goods returned to the value of $95,520. PW2 has admitted the return of these goods and acknowledged it at exh P10, the plaintiff's unaudited statement of accounts from 1 January 1983 to 7 January 1983 but despite his assertion that he did so because of overstocking, it can equally be said that the goods were returned based on the consignment term in AB22. For the very reason that I consider AD6 to be suspect, I cannot place any reliance on it as to vary the term of AB22 relating to P1 being delivered to the plaintiff on credit basis.

Under D27, Condition 7(a) has been expressed as follows:

> Unless otherwise expressly stated in the policy this insurance does not cover:
> (a) Goods held in trust or on commission.

However, the schedule of D27 clearly shows that goods held in trust or on commission are covered by the policy and this is expressed by the following words:

> The above are the property of the insured or held by them in trust or on commission for which they are responsible in the event of fire or lightning or any of the insured perils whilst contained in the double storeyed building of brick walls and the roof attached to buildings of similar construction occupied as godown situated at No 69 Jalan Satu, Taman Bukit Anggerik, off Jalan Cheras, Kuala Lumpur.

Relying on this limitation placed by the policy, it is the defendant's contention that since P1 did not form part of the goods held in trust or on commission, there has been a breach of Condition 7(a).

In *The North British and Mercantile Insurance Co v Moffatt & Anor*,[1] the court was asked to give its opinion on the effect of the very same words appearing in the schedule to D27. The court held that only goods belonging to the insured are covered by such a policy and that a chest of teas, the subject matter in dispute before the English court which had already been sold by the insured to purchasers, were not covered by the policy as the property in the teas had passed to the purchasers and that the teas remained at their risk and not the risk of the insured.

Similarly, P1, which had been delivered to the plaintiff for sale or return, cannot possibly form the property of the plaintiff at the time of the fire and to that end such goods were not covered by D27.

D27 also contains a number of warranties, two of which relate particularly to the storage of hazardous goods, ie Warranties 6A and 6C. Apart from a few exceptions, Warranty 6A lists the goods deemed to be hazardous, storage for which is prohibited by the policy.

The issue raised on Warranty 6A is whether it is applicable and if so whether the plaintiff had breached it by storing prohibited goods.

D27, without the attachments and endorsements, is a standard type, printed, fire policy and hence the preamble in the policy makes reference to the defendant's liability being subject to the conditions contained in the policy or endorsed or otherwise expressed. One such endorsement relates to the particulars appearing in the schedule which, inter alia, describes the property to be insured subject to the warranties, clauses, and endorsements as printed at the last page of the policy. In this instance, only Warranty 9A has been endorsed as being the only warranty agreed to be applied to the policy. To that end as Warranty 6A has not been specifically and expressly endorsed in the policy, I consider that it is not binding to either the plaintiff or the defendant and to that end, the defendant cannot seek its protection.

But I cannot say the same of Warranty 6C as that had been specifically attached to the policy and it is worded in the following manner:

> Warranted that the storage of paints be allowed but that otherwise during the currency of this policy no mineral oil or other liquid giving off an inflammable vapour flashing below 200°F/93°C beyond 400 gallons of kerosene oil or other inflammable liquid not giving off an inflammable vapour flashing below 100°F/38°C and/or 200 gallons of benzine, petrol or other liquid giving off an inflammable vapour flashing below 100°F/38°C (stored in accordance with the municipal regulations) and not more than four cases or four cartons of matches and/or four cases of fire crackers be in or upon the premises.

By Warranty 6C, the plaintiff is allowed to store in accordance with the municipal regulations and byelaws, the following hazardous goods within the respective quantities and flash points:

(1) 400 gallons of kerosene or other mineral oils or liquids combined, giving off an inflammable vapour flashing between 100°F/38°C and 200°F/93°C; and/or
(2) 200 gallons of benzine, petrol or other liquid combined giving off an inflammable vapour flashing below 100°F/38°C; and
(3) not more than four cases or four cartons of matches and/or four cases of fire crackers.

It is accepted by both parties that the only items of goods prohibited by Warranty 6C are P1 and P2, as their contents fall within the category of 'other liquid' and provided they do not exceed 200 gallons in quantity and contain flash points below 100°F/38°C, their storage is allowed under D27. Evidence on the quantities and the flash points of P1 and P2 were led by:

(1) the plaintiff's chemist, PW5, and his certificates of analysis P11–P14, all dated 11 July 1983;
(2) the defendant's chemist, DW1, and his certificate of analysis D7, dated 23 January 1983; and
(3) Graham Miller's report, D18.

The plaintiff took exception to the evidence of DW1 and his certificate D7, on the ground that DW1 is not an expert under s 45 Evidence Act 1950 and since he did not conduct the tests on the samples of P1 and P2 but merely

signed on D7, the court should rule his evidence and his certificate as being inadmissible.

The question as to whether a person is an expert or not has been summed up by Suffian LP in the case of *PP v Muhamed bin Sulaiman*[2] as follows:

> ... it is true that this [whether a person is an expert] is a preliminary question to be determined, but it is a question upon which in practice, considerable laxity prevails. This is because while the expert must be 'skilled', he need not be so by special study, he may be so by experience; and the fact that he had not acquired his knowledge professionally goes merely to weight and not to admissibility.

DW1 has testified that he holds a degree in polynear chemistry and technology and that he is a consultant chemist registered under the Chemists Act 1975 ('the Act'). Registration under the Act is only available to academically qualified chemists with experience. On the letterhead of D7, the initials AMIC appear after DW1's name and these initials can only stand for 'Associate of the Malaysian Institute of Chemistry' and even though there is no evidence to show when he was registered as an associate he must have had ten years' practical experience in chemistry if he holds a pass degree or two years for an honours degree under s 17(3) of the Act, to qualify for registration. By virtue of this fact of registration alone, I consider that DW1 has the necessary skill and experience to analyse the contents of P1 and P2 and to that end he is an expert.

DW1 also explained that the chemist who conducted the tests on the contents of P1 and P2 was not a registered chemist and as such, under s 23(2) of the Act, he did not have the power to issue D7. For that very reason he had signed D7 as, being a registered chemist himself, he has the statutory power to issue D7, but before doing so he had discussed the tests with the chemist who conducted them, and only after concurring with his findings did DW1 sign D7. As I have no reason to doubt DW1's testimony, I accept both his evidence and D7 as that of an expert.

As the defendant's adjusters, Graham Miller did a joint physical count of all items salvaged at the godown together with PW2. They recovered 30,439 cans, large and small, of P1 and 7,880 bottles of P2. They took random samples of P1 and P2 to Chemical Laboratory (M) Sdn Bhd on 13 January 1983 to determine the liquid quantities and flash points and the chemist's findings are found in D7.

Likewise the plaintiff also sent samples of P1, P2 and P3 to Consolidated Laboratory (M) Sdn Bhd on 23 June 1983 with instructions to analyse their contents and flash points. PW5, the chemist who tested P1, P2 and P3 was only able to determine the flash point of P2 which he states to be 38°C in his certificate, P14, but not of P1, as the contents was observed to foam when heat was applied. This is confirmed by his certificate, P11. However he did not analyse the quantities of the contents of P1 or P2 and all his four certificates, P11–P14 are silent on this.

By far, D7 contains more particulars and details as it confirms firstly that the samples of P1 contain volatile flammable substance and that a large can and a small can of P1 contain 0.147 and 0.047 imperial gallons of liquid respectively. When these quantities are multiplied by the 17,686 large and

12,753 small cans recovered at the godown, there is a total of 3,199.23 imperial gallons of volatile flammable substance which far exceeds the 200 gallons permitted by Warranty 6C. Although DW1 was not able to determine the exact flash point of P1 nonetheless he was able to certify that it flashed at a low temperature of –30°C.

From the samples of P2, DW1 was also able to determine that a filled bottle contains an average of 0.195 imperial gallons of flammable substance with an average flash point of 24°C. Of the 7,880 bottles of P2 salvaged, only 461 bottles were found to be filled with fragrance and multiplying the number of filled bottles with the quantities analysed, there is another 89.895 imperial gallons of flammable liquid stored in the godown which when added to the quantities of P1, clearly shows that the plaintiff had blatantly breached Warranty 6C.

I now turn to the issues raised by Warranty 9A which reads as follows.

> Warranted that during the currency of this policy, the insured shall hold such licence or licences as is or are required by the local municipal on other authorities and shall fully comply with the conditions and requirements thereof at all times.

The licence that is intended by the warranty is the godown licence under byelaw 2 of the Licensing of Trades, Businesses and Industries (Federal Territory) Byelaws 1981, for which a fee ranging from $200 to $500 is payable by the occupier of a godown depending on the floor area of the godown.

Since it was the plaintiff's statutory duty to apply for the licence, PW2's evidence on this is that he paid $1 for the application form for the godown licence for which a receipt, AC3 dated 30 September 1982 was issued by Dewan Bandaraya, Kuala Lumpur. He had then filled up the form and submitted it to Dewan Bandaraya. When the licence was not forthcoming, he had then written AC2 on 20 October 1982 to Messrs Loh's Commercial Services, the agent with whom he negotiated for the policy, requesting them to suspend Warranty 9A from the policy. There is an endorsement also dated 20 October 1982 on AC2 itself acknowledging that AC2 was received by PW7, the agent from Loh's Commercial Services. It is the testimony of PW7 that he had then submitted AC2 to his principal, Superb Insurance Services Sdn Bhd ('Superb'), but PW6, the agent from Superb, could not, however, recall whether he received AC2 from PW7 and neither could the defendant trace AC2 from its records.

The defendant denies any knowledge of AC2 and for that matter had not taken any step to suspend the operation of Warranty 9A in D27. It maintains that AC2 is yet another backdated letter created by the plaintiff to protect itself of its breach of Warranty 9A.

In this context, my attention was also drawn to another endorsement in D27 which reads as follows:

> Breach of warranty clause
>
> Any breach of the within warranty without the knowledge and consent of the insured shall not prejudice this insurance provided notice in writing be given to the company immediately upon such breach coming to their knowledge.

DW4, the defendant's claims manager, testified that by this clause, the moment the plaintiff became aware that he had breached a warranty in D27, it is incumbent upon him to inform the defendant in writing and on being so informed, the defendant may waive the breach. In reliance on this clause, it is the plaintiff's case that AC2 was specifically written for that purpose and since the defendant had knowledge of AC2, he further contends that the defendant had already waived Warranty 9A regardless of its omission to suspend its operation in D27.

When cross-examined, PW2 readily admitted that he was not in possession of a godown licence at the time of the fire. The first matter to be determined is whether the defendant had knowledge of such a breach so as to waive the operation of Warranty 9A.

When PW2 negotiated for the policy, he dealt with PW7, the agent from Loh's Commercial Services and PW6, the agent from Superb. All three had visited the godown and PW6 and PW7 were fully aware that goods like P1, P2 and P3 were to be stored in the godown. PW6 also testified that he prepared a survey report of the godown together with photographs and particulars of the goods to be stored and had tendered the report to the defendant.

From D15 dated 18 December 1981, it is clear that Superb is an agent of the defendant to represent and solicit business on behalf of the defendant. There is, however, no evidence to show that Loh's Commercial Services had executed an agent's contract, similar to D15, with the defendant but PW6 has testified that Loh's Commercial Agencies is one of Superb's agents authorized to conduct business on behalf of Superb. Thus from the evidence it is clear that Superb is an underwriting agent for the defendant whilst Loh's Commercial Services is a sub-agent of the defendant.

The position of the sub-agent in law is that generally there is no privity of contract between the principal and a sub-agent, the sub-agent being liable only to his employer, the agent. Thus knowledge acquired by the agent becomes the knowledge of the principal but knowledge of the sub-agent can never be attributed to the principal. That being the case, accepting AC2 on its face value, and relying on PW6's evidence that he cannot recall receiving AC2 from PW7, I accept the defendant's contention that it was not aware of AC2. This finding is reinforced by the fact that had the defendant been aware that the plaintiff had no godown licence, it would have imposed a 10% loading on the premium in accordance with the Tariffs And Rules for Fire Insurance, D28, issued by the General Insurance Association of Malaysia or PIAM.

In this case, no additional premium was charged to the plaintiff and in any event, there is no complaint from the plaintiff that the premium paid included a percentage as fair compensation for the lack of a licence.

The fact that PW6 had tendered a survey report to the defendant containing photographs of the godown and the goods to be stored does not help the plaintiff in any way as there is no knowing whether the report did state the fact that the plaintiff has not obtained a godown licence. PW6 was not able to produce a copy of the report to assist the court to ascertain its contents and neither could the defendant find the report amongst its

records. Its non-production by the defendant could be due to the obvious that it never received it or if indeed it was submitted it may well have been misplaced as the company underwent a change of management in 1980 and a shift in offices which resulted in the loss of records as evidenced by the police report, AD79. In any event if indeed there was a survey report stating the lack of a godown licence, it is highly inconceivable that the defendant did not load the plaintiff with a 10% hike in the premiums due and the fact that they did not do so can only mean that there is no mention of any godown licence or the lack of one in the report. Since the defendant was not aware that the plaintiff had breached Warranty 9A, the plaintiff's plea of waiver of such a breach does not arise. From the facts and the law, I find that there is a clear breach of Warranty 9A by the plaintiff.

I now come to the last defence that the plaintiff's claim is fraudulent and in breach of Condition 13 of D27 which is expressed as follows:

> If the claim be in any respect fraudulent, or if any false declaration be made or used in support thereof, or if any fraudulent means or devices are used by the insured or any one acting on his behalf to obtain any benefit under this policy, ... all benefit under this policy shall be forfeited.

The fraud expressed in Condition 13 covers a wide area of conduct as it is not only confined to the loss and damages occasioned by the wilful act of the plaintiff or with his connivance but also any fraudulent means or devices used by the plaintiff either acting alone or in concert with others to obtain any benefit under the policy. For this reason the defendant has pleaded in para 10 of its statement of defence particulars of the fraudulent means and devices, of which the burden of proving is the criminal burden of proof beyond reasonable doubt.

The particulars of fraud under paras 10(a) and (b) refer to the discrepancies in the quantities of goods claimed by the plaintiff to have been stored before the fire and to the actual number recovered in the godown after the fire.

When Graham Miller was called by the defendant to survey and investigate the plaintiff's claim, both DW2 and DW3 did a physical inspection of the godown, sifted through the debris and did a physical count of all identifiable items recovered, together with PW2. At the end of each day, DW2 made an inventory of all goods recovered in P4 and PW2 had acknowledged the correctness of the quantity of the goods salvaged by signing at every page of P4. The whole exercise took 15 days with attendance at the godown from 11–29 January 1983.

From the summary of P4 that appears in P5, the quantities of P1, P2 and P3 recovered were 30,439 cans of P1 (large and small), 7,880 bottles of P2 and 9,386 pieces of P3. The numbers of these goods as claimed by the plaintiff in his stock list as at 7 January 1983 in AB14 are 30,538 cans of P1 (large and small), 7,906 bottles of P2 and 56,956 pieces of P3.

The difference of 89 cans of P1 is too small a difference as to be negligible when dealing with the allegation of fraud, so too the difference of 26 bottles of P2. But a difference of 47,570 pieces of P3 is quite a different matter and no explanation was given by the plaintiff why this was so. The

same too applies to the other stock-in-trade for which there is a vast difference between the quantities listed by the plaintiff and those recovered after the fire and for which P5 speaks for itself.

Of course it can be argued that the first must have destroyed a substantial amount of the stock-in-trade as to be unidentifiable for a physical count. However, there is undisputed evidence from DW3 that the fire was not as great as to destroy most of the goods as it was confined to the front portion of the godown, but there was a resultant heat and smoke damage throughout the interior. Under such circumstances, it was not difficult for DW2 and DW3 to actually determine the quantities of the identifiable goods by physical inventory.

By para 10(c) of its statement of defence, the defendant also takes exception to the contents of AD8, for although it confirms that P1 were supplied for sale or return in conformity with AB22, the plaintiff now claims that such goods were in fact delivered on credit for a period of five months pursuant to AD6.

It must be remembered that AD8 was executed at the time DW2 and DW3 were surveying the ravages of the fire and listing the inventory of the identifiable stock-in-trade. As P1 represented the bulk of the goods stored, it is only natural that DW2 and DW3 should identify the status of the storage of such goods to ascertain the plaintiff's true claims. At that point of time, apart from AB22, there was no other document produced by the plaintiff governing the terms of delivery of P1 and it was to reconfirm the status of P1 that Graham Miller prepared AD8 and had both PW1 and PW2 sign on it. As far as I can see, AD8 is nothing more than an affirmation that P1 was delivered for sale or return.

As the events turned out, AD6 surfaced later and is being relied upon by the plaintiff to support his claim for the loss of P1. I have already expressed my doubts as to the authenticity of AD6 but nonetheless the letter is there and admitted to have been executed by PW3, the managing director of Banfoong; the fact of its presence alone is a clear indication that it is a device to assist the plaintiff's claim. But is it a fraudulent device?

I answer this in the negative if that was the only evidence of wrongdoing but when coupled with the other facts prevalent in this case, I consider it to be fraudulent.

I now come to the particulars of the fraudulent means or devices engaged by the plaintiff to bolster his claim. This refers to the 7,880 bottles of P2 recovered at the godown after the fire out of which 7,419 bottles were found to be empty whilst the remaining 461 bottles had liquid or traces of liquid in them. To eliminate the suggestion that the contents of the empty bottles could have been evaporated due to exposure to heat, the testimonies of both the chemists called by the parties are relevant and although they differed in certain particulars, at least in one aspect they were in complete agreement. They testified that if the empty bottles had contained liquid before the fire, but that the intense heat had evaporated the liquid, there would at least be some charred residue apparent in the empty bottles.

In this instance, the court is considering not 200 or 300 empty bottles but 7,419 empty ones for which no charred residue is found in them. From

this very telling evidence I can only conclude that the 7,419 bottles were in fact empty even before the fire and the fact that the plaintiff had included them can only mean that he is doing so fraudulently to enhance his claim.

Apart from the particulars of fraud, false declaration, fraudulent means or devices pleaded by the defendant, there are other aspects of this case which, when weighed in all its totality, add up to the plaintiff's claim being made fraudulently under Condition 13 of D27.

To begin with, PW2 admitted that within three days of the commencement of the plaintiff's business, he had goods worth $½m on credit supplied by Banfoong. He claims that as a former employee, Banfoong trusted him. He had no retail outlet, he sells his goods at the 'pasar malam' and he had no confirmed orders for any bulk purchases for his goods.

The fire occurred three months after he commenced business and at that point of time, he had stock in trade worth $1.17m and his turnover for the same period was only 10%.

Added to this is the series of conduct demonstrated by both the plaintiff and Banfoong against the defendant. The plaintiff filed a Winding-Up Petition No 104/83 in the High Court, Kuala Lumpur against the defendant but the defendant obtained an injunction restraining the plaintiff from proceeding with the winding-up petition. This took place on 24 October 1983 as evidenced by D6. The plaintiff then withdrew the petition but not before a copy of it had been served on the defendant's bankers, Overseas Union Bank Ltd which is confirmed by AD70, a letter written by the bank on 14 October 1983 inquiring from the defendant as to its financial standing.

Then in 1985, Banfoong sued the plaintiff in Civil Suit No C1433/85 for moneys owed for goods supplied, these being P1, P2 and P3. Banfoong obtained judgment in default against the plaintiff for $1,079,605.20 on 19 April 1985. In executing this judgment four years later on 12 August 1989, Banfoong was assisted by the plaintiff who had granted a power of attorney to Banfoong on 12 January 1983 enabling Banfoong to collect the amount due on D27 directly from the defendant. Armed with this power of attorney, Banfoong attempted to garnish all sums due under D27 from the defendant garnishee. The garnishee order nisi D8 was, however, not made absolute as, upon objections made by the defendant, Banfoong subsequently withdrew it.

From the very conduct of both the plaintiff and Banfoong and coupled with my findings of the means and devices embarked by the plaintiff to pursue his claim under D27, I have no doubt whatsoever that his claim has been made fraudulently under Condition 13 and thereby he forfeits his right to claim under D27. For the many reasons and conclusions that I have given, the plaintiff cannot possibly succeed on his claim and to that end I dismiss his claim with costs.

Claim dismissed.

Reported by Teh Y-Lyn